

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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|------------------------------------|---|-----------------------|
| In Re: Heartland Payment Systems | : | 4:09-md-02046 |
| Inc. Customer Data Security Breach | : | |
| Litigation | : | MDL No. 2046 |
| | : | |
| | : | Hon. Lee H. Rosenthal |
| _____ | : | |
| This Document Relates to: | : | |
| | : | CLASS ACTION |
| <u>ALL ACTIONS</u> | : | JURY TRIAL DEMANDED |

**PLAINTIFFS' MOTION FOR LEAVE OF COURT TO FILE
A SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO STAY
DISCOVERY DURING THE PENDENCY OF ITS MOTIONS TO DISMISS**

Plaintiffs in the Financial Institution Track and in the Consumer Track hereby respectfully seek leave of Court for permission to file a short Sur-Reply in Further Opposition to Defendant's Motion to Stay Discovery During the Pendency of its Motion to Dismiss. (Dkt. No. 15).

Defendant's September 8 Reply Memorandum in further support of its motion to stay misconstrues, *inter alia*, the negotiations held between the parties regarding discovery. The filing of a Sur-Reply in order to clarify this newly presented evidence is, therefore, appropriate here. *See Murray v. TXU Corp.*, No. 3:03-CV-0888-P, 2005 U.S. Dist. LEXIS 10298, at *3 (N.D. Tex. May 27, 2005) ("A sur-reply is appropriate by the non-movant only when the movant raises new legal theories or attempts to present new evidence at the reply stage."); *Fast Capital Mktg., LLC v. Fast Capital LLC*, 2008 U.S.

Dist. LEXIS 103988, at *4, n.1 (S.D. Tex. Dec. 24, 2008) (denying motion to strike sur-reply brief). Plaintiffs' proposed Sur-Reply is attached hereto as Exhibit A.

Pursuant to Local Rule 7.1(D), Plaintiffs' counsel state that they have conferred with counsel for Defendant, who consents to its filing on the condition that Plaintiffs will consent to Defendant filing a sur-sur-reply if Defendant determines that Plaintiffs raise something new in their sur-reply. Plaintiffs agree (and will raise no new matters in their sur-reply).

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the attached Order granting them permission to file their proposed Sur-Reply.

Dated: September 15, 2009

Respectfully submitted,

/s/ Michael A. Caddell

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CERTIFICATE OF SERVICE

I hereby certify that, on September 15, 2009, this document was filed electronically via the Court's ECF system and thereby served on all counsel of record.

/s/ Cory S. Fein
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